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Risky Business: Trade Associations and Canadian Competition Law

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Canada's first competition legislation was enacted in 1889, with the intention of combatting the price-fixing and other anti-competitive conduct of so-called "combinations." Trade and professional associations figured prominently among the "combinations" alleged to have engaged in this anti-competitive behaviour. As one observer commented at the time, "there are few branches of trade in this or any country which are not represented by associations which seek to prevent unprofitable competition".

Fast forward to 2012, and it is apparent that Canadian competition authorities continue to harbour similar concerns about the legality of certain trade and professional association activities under Canada's current competition legislation, the Competition Act (the "Act"). Here are a few recent examples:

• The TREB Case: In May 2011, Canada's Competition Bureau (the "Bureau") brought an application alleging that the Toronto Real Estate Board ("TREB"), Canada's largest real estate board, had engaged in anti-competitive conduct under the Act's abuse of dominance provisions. The Bureau claimed that certain rules enacted by TREB are anti-competitive because they prevent realtors from offering various services over the Internet, such as "virtual office websites" or VOWs. According to the Bureau, these restrictions have impeded the development of more innovative business models for realtors and more cost-effective services for customers. The Bureau's application was heard by the Competition Tribunal in September/October of 2012 and a decision is now pending.

• The CWTA Case: In September 2012, the Bureau commenced an action in the Ontario Superior Court of Justice alleging that certain Canadian telecommunications companies had made or permitted other third parties to make false or misleading representations to the Canadian public about the charges associated with third party "premium" text messaging programs and applications. The Bureau also named the Canadian Wireless Telecommunications Association ("CWTA"), the industry group representing cellular, fixed wireless and mobile satellite carriers, as a defendant in this action (the three telecommunications company defendants are members of the CWTA). The Bureau alleges that the CWTA (i) facilitated the misleading representations made by the third party text services providers and permitted by the telecommunications company defendants, and (ii)made misleading representations of its own. The action is still in its preliminary stages.

• Cartel/Bid-Rigging Investigations: According to a recent presentation by a Bureau official, there are at least four ongoing criminal investigations in which the Bureau is examining the role played by trade associations. Press reports indicate that one of these investigations involves alleged price-fixing by concrete companies in the Toronto house-building industry.

Bureau concerns about trade/professional associations were further underscored recently by the new Interim Commissioner of Competition, John Pecman.

In remarks delivered on October 30, 2012 emphasizing the importance of competition compliance in Canada, Mr. Pecman singled out trade associations for special attention, commenting that "[w]hile the Bureau does not believe that trade associations are inherently bad, it is also clear to us that there are practices they engage in which raise significant risks. Indeed, meetings and relationships formed between competitors through trade associations provide the forum and the temptation to engage in anti-competitive activity".

Mr. Pecman highlighted three types of association conduct that are particularly apt to attract Bureau scrutiny:

• restricting the types of services members can offer;

• using mechanisms such as fee schedules or standard setting to limit competition between members or to make entry more difficult; and

• engaging in conduct that reduces the incentives to compete vigorously, such as creating transparency between members through the vehicle of information exchanges.

These areas of concern are not new. Indeed, the core dispute in the TREB proceeding referred to above is over the effect on competition of the association's restrictions on members' service offerings. But it is significant that Mr. Pecman took the opportunity of his first speech as Interim Commissioner to emphasize that trade associations will remain an enforcement priority for the Bureau under his watch.

As to the specific issues raised by Mr. Pecman, while every situation will be different, here are a few general guidelines to consider:

• Association rules regarding the scope or nature of members' business/service offerings should have a legitimate, objective justification and should impose the minimum restrictions necessary to achieve these legitimate ends. Association rules should not be used to create artificial barriers to entry or to limit competition from innovative or alternative business structures and practices.

• Similarly, any industry or professional standards established by an association must be objectively justifiable, and designed to achieve non-discriminatory and pro-competitive goals (e.g., to improve product quality, safeguard product safety, increase the interoperability of products, etc.). They also should be applied in a fair and non-arbitrary manner.

• Associations should not adopt mandatory fee schedules. If suggested fee schedules are adopted, associations must be vigorous in ensuring that these schedules are truly voluntary (e.g., there is no effort to enforce or even encourage compliance) and that the process followed in developing the suggested fee guidelines does not facilitate collusion among members.

• Associations should limit the number of information gathering/exchange exercises in which they engage and should ensure that the procedures they use to compile, analyze and communicate information are sufficiently robust to avoid facilitating collusion among members. Examples of such procedures include using an independent third party to conduct the process and disseminating only aggregated, historical information to members.

The other important area that associations should focus on is the conduct of meetings. At the very least, association meetings should commence with a re-affirmation of the association's commitment to adhere to the law. It is also advisable to circulate meeting agendas in advance, keep detailed minutes of association meetings, and ensure that meeting discussions do not stray into potentially risky areas. Finally, although more difficult to police, associations and members also must be careful to safeguard against the discussion of inappropriate topics during informal social encounters.

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